Supreme Court, U.S.
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ALL
RECORDS
AND
BRIEFS

In The

# Supreme Court of the United States

LARRY ANDRIST,

*Petitioner,*

v.

MEDICAL COLLEGE OF GEORGIA, BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, and ROBERT COLEMAN, et al.,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. In a First Amendment claim challenging a retaliatory demotion by a nominal manager, brought by a government accountant and the only fiscal affairs manager in an interagency agreement with master and subservient agencies, is it error to apply the *Garcetti* job duty paradigm over broadly to mask illegitimate prior governance by a nominal supervisor, who was not an accountant, who interfered with and delayed the government accountant's duty to provide the master agency with accurate time-sensitive budget information about the subservient agency, where the accountant's report in resistance of the nominal manager's illegitimate interference exposed mismanagement of a large deficit and the interference, where in applying the paradigm the court did not factor in the illegitimate interference with the accountant's initial duty, nor the fact that the state had placed the accountant in a position where he was not free, without jeopardy to his employment, to speak as a citizen, and not violate the illegitimate "job duty order" under the paradigm, and where the finding implied that the nominal manager in a subservient agency controlled funds of the master agency by the yearly legislative budgeting process, raising separation of power concerns?

**QUESTIONS PRESENTED** – Continued

II. Does the *Garcetti* job duty paradigm of supervisory control over legitimately supervised speech, apply to speech of a nominal supervisee, over which the nominal supervisor has organizational nominal control, but where the challenged speech owes its existence to a higher agency or department in an interagency agreement?

III. Whether interference by a nominal supervisor with timely and good faith professional, expert subject matter investigation and speech, intended for an audience of a higher governmental authority, or separate branch, can be the basis for a *Garcetti* job duty defense, where the nominal manager is interested in hiding his own malfeasance by trying to control the substance and timing of delivery of the subject matter expert's speech?

## LIST OF PARTIES

| | |
|---|---|
| Petitioner-Plaintiff | Larry Andrist |
| Defendant-Respondent | Board of Regents, University of Georgia |
| Defendant-Respondent | Michael Ash |
| Defendant-Respondent | Robert Bradford |
| Defendant-Respondent | Robert Coleman |
| Defendant-Respondent | Daniel Rahn |

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The order of the U.S. Court of Appeals for the Eleventh Circuit denying the Petition for Rehearing or En Banc Hearing is *Andrist v. Medical College*, 11th Cir. No. 06-14689-JJ (August 10, 2007). (App. 16-17).

## BASIS FOR JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I

Congress shall pass no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to

assemble, and to petition the Government for redress of grievances.

U.S. Const. amend. XIV § 1

. . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

## STATEMENT OF THE CASE

### I. FACTUAL BACKGROUND

The Georgia Department of Corrections uses taxpayer funds provided by the legislature through a yearly budgeting process to provide medical care to the inmates at the State's facilities. (Andrist REF 41-16-18). The monies provided are "appropriated"

through the legislative budgeting process and "No money shall be drawn from the treasury except by appropriation made by law." Ga. Const. Art. II, § IX, ¶ 1.

In 1997 the Ga. Department of Corrections (DOC) entered into an interagency agreement with the Medical College of Georgia (MCG) to provide medical care to inmates, which is negotiated yearly because of the budget. (*Id.* 16-19). The purpose was to save the taxpayers money by using a subservient agency. MCG created a department, Georgia Correctional Health Care (GCHC) to provide the care. (*Id.* 16 & 18).

Andrist was hired in June 1997 as the Fiscal Affairs Director (*Id.* 20) and his duties included:

> controlling and monitoring all funding from the Department of Corrections to MCG, developing budgets, doing variance analysis when cost exceeded budget. I managed the accounting process and guidance through . . . the correctional facilities, to ensure that financial goals were achieved.

(*Id.* 16-17). There was no job description until after the challenged demotion in April 2002 and the relocation by Coleman.

From a practical view of governance in the larger sense, Andrist was the accounting watchdog for three entities, MCG, Ga. DOC and one legislature that appropriated the public's funds. (REF 74-5). (R5-83-4-7, 69-70). Although he was paid by the Medical College of Georgia (MCG) and worked daily in a

department called Georgia Correctional Health Care (GCHC) with MCG staff under his supervision, and others on financial and auditing matters, he was the only person in the interagency agreement between the Ga. DOC and GCHC who monitored the spending and predicted budget and part of his professional duties.

When Andrist was hired in 1997, Bob Coleman, a defendant herein and the primary discriminatory official, became a GCHC employee as Director of Network Operations. (Coleman REF 43-6) (Andrist REF 72-24). Andrist testified that Coleman never became his supervisor (Andrist REF 72-25) as Andrist was the Fiscal Affairs Director of GCHC.

Coleman moved to MCG in Auxiliary Services and eventually positioned himself so that all information and contracts ran though him. (R6-84-1). Bob Coleman began with GCHC as the Director of Network Development or Contract Services and then became the MCG Director of Management Services, where he also directed Auxiliary Services. (REF 72-11). Auxiliary Services was the equivalent of the federal Government Services Administration.

This statement of facts will be limited to some of the illegitimacy and the retaliation more temporally and substantively connected to the interference with accounting reporting duties and the demotion. The District Court's order does not address all of the illegitimate acts nor the prior harassment. (App. 5-11).

In the years between 1997 and the beginning of 2002, there were a series of actions by Coleman that prompted Andrist to question Coleman's integrity and competence, the details of which will not be repeated here except for a few examples.

In 1999 Coleman encumbered funds that were not due from the DOC (R5-83-105) and Coleman said that Ash had said to do the encumbrances, which would go through Auxiliary Services and remain in the MCG budget. (R5-83-110-111, 127).

The next year Andrist had to reverse encumbrances done by Coleman of over $3,000,000 that were not legitimate, and Coleman knew that Andrist had reversed the illegitimate encumbrances. (R5-83-114-115, 116, 120; R82-Ex. D & E).

In December 2000, based on multiple concerns and lack of power to do anything to correct the problems or really investigate, Andrist went to MCG Legal. (R5-83-159). MCG conducted an investigation that concluded there was no actual fraud by Coleman, but did not address specific information from Andrist.

Coleman learned of the investigation and began to harass Andrist. Once in January 2001 when Andrist was in the basement where invoices were kept and where Andrist had gone to do accounting investigation, Coleman had the police called and had Andrist escorted from the basement under threat of arrest. (R3-64-23-30) (R3-64-8, 16-19, 23-39; R5-83-190, 192).

Since the inception of the agreement, the Department of Corrections and Assistant Committee ssioned level representatives met with GCHC on a monthly basis in interagency meetings involving officials from the master and subservient agency to discuss the budget and services in what were referred to as Executive Medical Management Committee (EMMC) meetings, referenced at App. 9 in the District Court's order.

Andrist would usually present the figures for the budget with Coleman in attendance (R5-83-78) who by this time was de facto head of GCHC and therefore responsible for operations and making budget. (Andrist REF 41-25).

In preparation for the March 2002 meeting with the DOC, Coleman directed Andrist not to discuss the shortfall and to blame absence of a budget report on software problems. (R5-83-239-240, 241-47; R6-84-3-Ex. 18, 26; Dist. Ct. p. 22 of 100; R82-242; R5-83).

In March 2002, the self-promoting supervisor, Coleman, tried to buy Andrist's silence by offering him disability retirement, which Andrist rejected because it would have been dishonest. (R5-83-239-240, 248-250).

In early April 2002, Coleman had the door to Andrist's office removed so that Andrist could not discuss matters in private about his concerns over mismanagement without those nearby and in league with Coleman hearing. (R5-83-251-252).

In preparation for the April meeting, Coleman and Defendant Bradford came to Andrist's office and told him to report a possible surplus of $104,000 at the end of the fiscal year, at the end of June, but Andrist's projections were for a large deficit, in the millions of dollars. Andrist refused. (R3-83-257-262). Andrist complained to Bradford to no avail. (R5-83-264-266).

At the EMMC meeting with the DOC officials on April 17, 2002, Coleman lied about a large looming deficit and produced falsified projections indicating a surplus (REF 73-38) (REF 74-11-12; Spradlin) (R6-84-3-Ex. 26), prompting Kissel of the DOC to ask if Coleman was sure that he wanted to say that, given that a deficit had been projected by Andrist in January (REF 74) (REF 74-9-10; Spradlin) (REF 73-10).

Andrist tried to speak out and Coleman shut him up. (REF 73-10; Kissel).

In a "sidebar" or telephone conversation (REF 74-12-13; Spradlin), Andrist told DOC's Spradlin that Coleman lied about the budget. (REF 74-13; Spradlin).

News about Coleman lying reached the Commissioner's office for the DOC, who called Dr. Rahn, the Dean of MCG, to complain about Coleman's deceitful actions as to the budget. (R75-16-17) (R70-17, 30). At about the same time, Ash told Rahn about the deficit. (R70-23).

The word got to Coleman that everyone knew he had lied and he became verbally and physically

aggressive, kicking Andrist's cubicle wall, angrily commanding him to never to speak to the DOC without his permission. (R83-508).

On Friday, April 19th, Coleman came to Andrist's office and demoted him from Director of Fiscal Affairs, reduced him to a non-existent position at an offsite medical prison, and reduced his budget oversight to 25%, trying to intimidate him into quitting. (R83-364; R84-5-Ex. 113-114; Inference) (R84-4-Ex. 43 & 44). Over the weekend, Coleman along with others ransacked Andrist's office, taking cards from his Rolodex with names and numbers, taking receipts, documents, and otherwise cleansed Andrist's office of evidence of the deficit, problematic overcharging, and "profiting" by MCG Administrative services under Coleman. (R83-279, 281).

After the DOC called Dean Rahn, Coleman was relieved of duty.

## II. DECISIONS BELOW

### A. District Court

The District Court addressed the fact that Andrist was Director for Fiscal Affairs for the named subservient agency (App. 5-6); however, it did not address the significance that ultimately the budget reporting was being done to the master agency that provided the funds yearly budgeted by the legislature which, given the District Court's ultimate conclusion and reasoning, was understandable.

Likewise, the District Court discussed some of the history of illegitimate acts in which Coleman engaged (App. 6-8) and the retaliation in which Coleman engaged prior to the challenged demotion (App. 9), but did not address facts relating to a determination of whether there was a subject matter and expertise, supervisor-supervisee relationship similar to that in *Garcetti v. Ceballos*, 547 U.S. ___, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006).

The Order addresses the illegitimate acts of Coleman in April 2002 trying to get Andrist to lie about the deficit and that Coleman prevented Andrist from speaking at the meeting between the master and subservient agency (App. 9-10), but did not address that these illegitimate acts by Coleman had prevented Andrist from being able to convey Fiscal Affairs manager speech he ordinarily could have conveyed to the master agency in a legitimately operating interagency agreement. There was no discussion as to whether Andrist had acted as a citizen, or whether this was petitioning activity, whether this was interference with investigation or reporting of accounting information, or whether this could not be typical job duty speech because Andrist was having to supervise his nominal supervisor.

The District Court construed post-demotion evidence in the defendant's favor (App. 10), where it should have been construed that Andrist used the open door policy to talk to the defendant Dean about reversing the demotion and transfer, and new mismanagement issues.

In a short analysis that is accounting content based, oblivious to the prior interference, or a legitimacy review, or analysis of whether this was a *Garcetti* supervisory relationship the District Court found,

> In light of the recent *Garcetti* decision, Plaintiff's First Amendment retaliation claims must fail because it is undisputed that Plaintiff's reports of fraud and financial mismanagement were made pursuant to his official duties as Fiscal Affairs Director at GCHC and as a financial manager at ASMP. Accordingly, Defendants' motion for summary judgment on Plaintiff's First Amendment retaliation claims is granted.

(App. 14).

There is no discussion of the illegitimate acts that prevented Andrist from legitimately speaking in a timely manner. There is no analysis as to why, in an application of the *Garcetti* job duty paradigm, nominal superior Coleman should be allowed to "regulate" Andrist's speech about budget owned by the master agency. It does not address that Coleman was not Andrist's accounting supervisor, nor about the role of the accountants as voices of the legislature's budgeted funds though nominally employed by others who control his job security, nor that traditionally accountants are given governmental organization structural independence for a reason, and that the public depends on the good faith and professional actions of the government accountant to give accountability to

the budgeting and elective process. The role of Andrist in the particular governance at issue was irrelevant, as was a result that promoted legitimate governance. All that mattered was that Andrist had engaged in accountant speech and acts.

The Court did not address how his plight of not being able to speak as a citizen or freely in his higher job duties without jeopardizing his job security was a state created plight of being an accountant for a master agency nominally employed in a subservient agency.

In effect, Andrist's job duty, under a contorted *Garcetti* paradigm molded over facts that freely ooze from under the mold, is based on an assignment where Coleman could assign Andrist to lie or be silent about the budget, and delay its report, but if later, Andrist acted legitimately in disregard of the illegitimate job duty assignment, even though it was in a sense being insubordinate, because it was an official duty, the *Garcetti* defense should be provided to the illegitimately governing defendants. In effect, the District Court viewed assignments for job duties so broadly that all circumstances were at once covered and irrelevant to the outcome so long as Andrist was taking accounting actions it was fodder for the *Garcetti* job duty defense, and masked Coleman's prior illegitimate activity, and implied legitimate control in Coleman over budget reporting matters, giving control of the funds to Coleman relative to the master agency and the legislature, because legitimacy of Coleman's actions were ignored.

### B. Eleventh Circuit

The Eleventh Circuit panel opinion

> . . . conclude[d] that there is no merit to any of the arguments that Andrist makes in this appeal. In fact, his claims are foreclosed by the Supreme Court's decision in *Garcetti v. Ceballos*, 547 U.S. ___, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006), and our recent precedents of *Battle v. Bd. of Regents for Ga.*, 468 F.3d 755 (11th Cir. 2006), and *Vila v. Padron*, 484 F.3d 1334, 2007 U.S. App. LEXIS 9115 (11th Cir. 2007).

(App. 1-3).

The panel's opinion is devoid of discussion as to why the evidence of "official dishonesty, deliberately unconstitutional action, [or] other serious wrongdoing" can be ignored, is oblivious to the illegitimacy that interfered with legitimate governance, which when carried out engendered retaliation.

The most salient facts in the pursuit of discussions that would enable better governance are shamefully missing from the decision with results anomalous to the larger goal of *Garcetti*. There is no discussion of how, in the name of good governance, it is not material to consider that a subordinate agency lied to a master agency about a budget.

Although the panel cited *Battle v. Board of Regents for the State of Georgia*, 468 F.3d 755 (11th Cir. 2006), there is nothing in *Battle* that clarifies the errors alleged here. *Battle* also suffers from an overly

broad application of job duty defense, overlooking an illegitimate job duty order by the office superior to be too generous with student loan money. In *Battle*, the panel found that speech by a former loan clerk in a university's student loan office, to a university's Vice President, reporting that her co-workers were being too generous with loans and that the office's superior, Mr. Huff, condoned it, was not protected. An audit of the relevant period required the school to repay over $2,000,000 to the Department of Education, and the supervisor resigned. The panel determined that under *Garcetti*, the speech was not of a public concern using the test of "whether . . . [the speech was] . . . pursuant to an official duty, not whether that duty was part of the employee's everyday job functions." *Id.* at 761. The fact that when the plaintiff had gone to the office superior he had essentially given her a job assignment that she was also to be too generous, was not addressed. Rather, the focus was on talisman terms that the speech was not protected because it was "part of [her] responsibilities" and official duty versus every day job function, *Battle*, 468 F.3d at 761-62 and n. 6, like this was a worker's comp case or an MSPB desk audit case.

The apparent basis for being able to ignore the illegitimacy, which is the elephant-in-the-room in every whistleblower case, was, in addition to saying it was "part of her responsibility," the fact that the clerks had been given a report with a Department of Education guideline that stated, "If you suspect an applicant, employee . . . has misrepresented

information . . . you should report your suspicions. . . . to [other officials]." *Id.* at 761, n. 5.

In *Vila v. Padron*, 484 F.3d at 1335, the plaintiff whistleblower was a lawyer hired with the title of Vice President of External Affairs for the Miami-Dade Community College by the MDCC President Padron, not a lawyer. When the facts are read from a practical perspective, with the evidence construed in Ms. Vila's favor, President Padron hired the lawyer on a short leash, of the year test period, to see if the lawyer would play ball, and could be used as a shill. President Padron executed a contract for advertising for more that $25,000 without putting it out for bid, which violated Florida law, to which Ms. Vila objected. *Id.* at 1336. Lawyer Vila objected to Padron and the Board of Trustees Real Estate subcommittee about hiring an outside counsel at an exorbitant rate where the outside counsel represented the sellers of a building at dispute, to Padron switching public funds to make them look like private to get matching funds from another source, to arranging a kickback, and other financial abuses related to a building purchase. *Id.* at 1336-37.

> Vila testified that all of her speech related to MDCC and (sic) was under her jurisdiction and authority as the Vice President of External Affairs. Vila testified she only voiced concerns to one person outside the College before receiving her notice of non-renewal.

*Id.* at 1338. The panel found no reason to factor in the element that the lawyer was engaged in speech

controlled by the profession and state granted license to practice to reflect legitimacy, which although not that big of a factor in one case, if undermined altogether, undermines the legitimizing nature of the nation's lawyers, whose ordinary advice guides the practical decisions of government and private affairs toward law and its order.

## REASONS TO GRANT THE WRIT

### I. Summary of the Reasons

Andrist brought a First and Fourteenth Amendment claim as a governmental accountant, and the only fiscal affairs manager in an interagency agreement, with master and subservient agencies, in which he was the nominal employee in the subservient agency, where however his ultimate role in larger governance, as the only fiscal affair manager, was a duty to convey accurate and timely accounting information about legislatively budgeted funds to the officials in the master agency with capacity to impact budgeted funds.

Andrist challenged a retaliatory demotion, following fiscal affairs manager previously restrained, stifled and delayed illegitimately by the defendant nominal manager, Coleman, in the subservient agency.

Later, when the plaintiff fiscal affairs manager accountant conveyed accurate accounting information

to the officials in the master agency, in defiance of the nominal manager's illegitimate prior job duty order, to lie or be silent about a large looming deficit, the accurate accounting information exposed not only the large deficit, but gross mismanagement by the defendant nominal manager, Coleman, and that he had lied to high ranking officials in the master agency.

At summary judgment, the subservient agency manager and the other defendants who helped maintain the challenged demotion, asserted the *Garcetti* job duty defense.

There was objective evidence proving that the defendant nominal manager had lied about the budget and tried to silence the accountant, that he had no fiscal affairs expertise, and relied upon on the plaintiff accountant for his fiscal conclusions. There is direct evidence from a master agency official who saw the defendant nominal manager physically silence the accountant at a monthly interagency meeting during the budget report.

It is error to apply or misapply the *Garcetti* job duty paradigm to find that the acts of the fiscal affairs manager are not protected by the First Amendment.

The evidence of the prior illegitimate interference with accurate reporting of time-sensitive budget information is evidence that the nominal subservient agency manger was not legitimate, efficient or effective.

To find that the First Amendment does not protect the accountant, who had no choice whether as a citizen or in his position as the fiscal affairs manager nominally employed by the subservient agency, though functionally the employee of the higher authority in the interagency agreement, was in a plight created by the state. He had been placed by the state in this interagency agreement to convey accurate accounting speech to its intended recipients, the master agency. Under *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 109 S. Ct. 998 (1989), the freedom to speak out without suffering jeopardy at the hands of the state should be protected, because of the position in which it placed the plaintiff, where from a practical perspective under *Madison Joint School District No. 8 v. Wisconsin Employment Relations Comm's*, 429 U.S. 167, 174-75, 97 S. Ct. 421 (1976), and like in *Pegram v. Herdich*, 530 U.S. 211, 225, 120 S. Ct. 2143 (2000) this accountant had as least two hats of official duty, where one of the hats served double duty, with a duty to a higher agency. Andrist was there to help the state save money, not help MCG make money, or make Coleman look good. The public paid a premium for Andrist's expertise, which the public wanted to be available to legitimately acting officials when they needed it, not at Coleman's whim.

The courts below focused solely on the expert accounting subject matter content of the speech, ignoring the surrounding, multi-layer "supervision" of the accountant's duty to speak and the prior illegitimate

job duty order preventing the job duty speech, which under "ordinary" circumstances could be given freely and openly in a time-sensitive manner, by basing its conclusion on an overly broad job duty misapplication of *Garcetti*, where before the paradigm applies the employer defendant should have to demonstrate no interference and that an assignment was not made necessary because of his own illegitimate acts.

By implication, as to Andrist the governmental accountant and the only fiscal affairs manager in an interagency agreement with master and subservient agencies, the courts find that the accountant's job duty speech is, and can be controlled by, the nominal supervisor, which shifts control of the accurate and timely reporting of the budget status to the nominal manager and subservient agency, implying a proprietary, instead of fiduciary interest, in control of and accounting for the funds provided to the master agency or department by the legislature through a yearly budgeting process subject to the legislature's right to accurate and time-sensitive budget account reporting.

Without analysis and the overly broad application of job duty, the courts assumed that the nominal manager was a legitimate supervisor for *Garcetti* paradigm purposes, contrary to the structure in the interagency agreement and the accountant's duty to the higher authority, where the nominal supervisor was not a same subject matter expert nor supervisor.

The courts' application of the *Garcetti* paradigm masks the manager's illegitimate prior restraint, interference and delay of the accountant's legitimate duty to report the looming, time-sensitive budget deficit information to the master agency, yielding a result anomalous to *Garcetti*'s larger goal of legitimate, efficient and effective governance.

The courts reached an anomalous result by failing to conduct a legitimacy review, where the question in whistleblower cases is how big is the supervisory illegitimacy elephant-in-the-room, and is there proof sufficient that legitimacy of the system is at stake if ignored. By failing to consider *Garcetti*'s undisputed facts, and therefore principle, and the second step in *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731 (1968) there is a requirement of a legitimacy factor or review, at some point, before making the "first step" the only step, where legitimacy of governance is necessarily viewed from a practical matter, not just as between two governmental employees with "org chart" proximity of different degrees, but governance at its many layers and is at the heart of these cases.

In this case of a governmental accountant, the courts' decisions undermine the traditional role of the governmental accountant to act as the voice of the legislature and public, to confront his nominal executive branch employer about effective and efficient use of the legislature's funds, where that independence is reflected throughout governmental organizational structure, where professional associations demand

that the fealty of governmental accountant accrue to the public, and not necessarily to the proximate superior, and where the decision fosters elimination of the citizen-like voice of the governmental accountant, in the ear of the executive, a most efficient and effective, day-to-day check in the separation of powers, and practical aid to correct ordinary negligence.

The court's application of the *Garcetti* job duty paradigm is in conflict with other circuits that provide First Amendment protection where there is interference with an investigator's investigation, where subordinates are asked to supervise supervisors or co-workers and petitioning activity.

## II. THE REASONS TO GRANT THE WRIT

A. To correct the violation of separation of powers, found in the premise of a judicial application of the *Garcetti* job duty paradigm when it provides a defense to an executive manager who interferes with a governmental accountant's duty to provide accurate, time sensitive reporting of legislatively appropriated and yearly budgeted funds to a higher authority connected to the budgeting process, by applying the job duty paradigm in an overly broad manner, tantamount to an overly broad job description, shifting control of a governmental accountant and his stewardship of the funds to the errant executive in any branch.

B. To correct misapplications of *Garcetti* and limit the adverse impact that the misapplications are

having on governmental accountants and the larger role they have traditionally played in day-to-day operations of legitimate governance, and add a legitimacy review from *Garcetti* or *Pickering* as to the interference, prior restraint, and heckling activity before making the final public concern, job duty finding.

In *Andrist* the results are anomalous to good governance.

The overly broad application of the job duty defense without a legitimacy review led to shocking reasoning in *Garnett v. State of Georgia*, S.D. GA. No. 1:06-CV-32 (April 12, 2007), 11th Cir. No. 07-11860-BB, in which Ms. Garnett, the highest ranking accountant in a local welfare office, who had confronted caseworkers about working overtime without prior state office approval, and for not timely reporting overtime hours so that caseworkers were not being paid overtime, and where she also reported this waste and abuse to the state office, exposing mismanagement by the caseworkers. The caseworkers were in a different line of authority and on a day when the local office director was absent, they essentially had a mutiny and terminated her. The individual defendants asserted the pre-textual reason that Ms. Garnet had not timely signed a requisition for medication for a foster child. The District Court dismissed the complaint, quoting from plaintiff's brief about the mutiny, and said that essentially, the mutineers terminated the plaintiff because of accountant speech, and therefore she could not state a claim.

*Garnett v. State of Georgia*, et al., S.D. Ga. No. 1:06-cv-032 (Order filed 1/03/07) (Doc. 40 at 7, n. 4).

*Garcetti* is being used to give governmental accountants a beating, as shown in *Leyva v. Alberto R. Gonzales*, 2007 U.S.App. LEXIS 17017 (7th Cir. July 13, 2007), an immigration case, in which a former Colombian governmental accountant asserted a political asylum claim based on having pointed out financial corruption in the Colombian Navy. The court in *Leyva* found, in reliance on *Musabelliu v. Gonzales*, 442 F.3d 995 (7th Cir. 2006) and *Garcetti*, "[i]t is an open question even in the United States whether the First Amendment gives public officials the right to be free of retaliation when they speak within an agency's hierarchy an issue of public concern, as part of their duties." *Leyva*, at *11.

In *Schuster v. Henry County*, 2007 U.S. Dist. LEXIS 41780 (D. Ga. 2007) on appeal, 11th Cir. No. 07-14270, the trail court found that speech about commingling local option sales tax funds that are designated for specific purposes was not protected, because his speech on these topics was foreseeable.

Governmental accountants and legitimate governance need a refinement or re-explanation of *Garcetti*.

C. Professional speech should be protected to the extent of the professional cannons. 120 Harv. L. Rev. 273, 282 (Nov. 2006).

The code of ethics for governmental accountants states that:

> this reliance imposes a public interest responsibility on the governmental financial management profession. The public interest is defined as the collective well-being of the community of people and institutions the government financial manager serves. (at 4).
>
> Consider the public interest to be paramount in carrying out your duties. (at 7).

The Association of Government accountants code of ethics, found at http://www.agacgfm.org/about/codeofethics.aspx.

D. Because this governmental accountant was placed in the position by the state of serving a subservient and a master agency, he was not free to perform his duties to the higher agency without suffering jeopardy at the hands of the state by his nominal employer, and under *DeShaney*, the plight of this governmental accountant to freely perform his duties under his civilian hat, to disclose the deficit, without adverse impact at the hands of his normal employer should be protected.

E. To the extent that Andrist's activity is considered traditional petitioning activity it should be protected and there would be a split in the circuits on this principle. *Hill v. Borough of Kutztown*, 455 F.3d 225 (3d Cir. 2006) (Hill went to borough commissioners); *Freitag v. Ayers*, 463 F.3d 838 (9th Cir. 2006) (letters to OIG and state Senator).

F. Andrist's speech was about the nominal supervisor interfering with legitimate public function and it should be protected. *Gray v. City of Cincinnati*, 2006 WL 2193187 (S.D. Ohio 2006) (complaints about supervisor's interference with investigator-employee's job duty investigating is protected).

G. Andrist's speech that was in effect supervising the supervisor, because that is not an ordinary job duty. *Wilcoxon v. Red Clay Consol. Sch. Dist. Bd. of Ed.*, 437 F. Supp. 2d 235 (D. Del. 2006).

H. A jury should decide the job duty question. *Kodera v. City of Kokomo*, 2006 WL 175007 (S.D. In. June 22, 2006).

I. Review should be granted to address the supervisor relationship in light of *Garcetti* or that the nominal bureaucratic supervisor is not a subject matter expert, and is not a *Garcetti* supervisor.

J. This case provides analogies to the plight of the National Security Employee, where legislation may be the answer. See, Sasser, J., The Silenced Citizens: the Post *Garcetti* Landscape for Public-sector Employees Working in National Security, 41 U. Rich. L. Rev. 759 (March 2007).

K. Every office deals with government funds and someone has responsibility for accounting for those funds. This case will have far greater reach and impact on other cases that are likely to arise and give better direction than the insular indiscreet situation of *Garcetti*.

L. This multilayered and multi-issued case is a good foil to explain application of *Garcetti* in comparison to the insular and discrete, one-on-one job duty communication in *Garcetti*.

## CONCLUSION

For the reasons asserted, the Petitioner requests that the writ be granted.

Respectfully submitted,

JOHN P. BATSON
303 Tenth Street
Augusta, Georgia 30901
706-737-4040
*Attorney for Petitioner*

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 06-14689

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D. C. Docket No. 03-00057 CV-DHB-1

LARRY ANDRIST,

Plaintiff-Appellant,

versus

MEDICAL COLLEGE OF GEORGIA,
BOARD OF REGENTS OF THE
UNIVERSITY OF GEORGIA, et al.,

Defendants-Appellants.

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Appeal from the United States District Court
for the Southern District of Georgia

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**(June 11, 2007)**

Before DUBINA and BLACK, Circuit Judges, and RESTANI,* Judge.

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* Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

PER CURIAM:

Appellant Larry Andrist ("Andrist") appeals the district court's grant of summary judgment against him and in favor of his employers and supervisors ("the defendants") on Andrist's claims that the defendants violated his First and Fourteenth Amendment rights. According to Andrist, the defendants retaliated against him for disclosing perceived fraud, waste, and abuse of public funds.

This court reviews a "grant of summary judgment *de novo*, drawing all [reasonable] inferences in favor of the non-moving party." *Fin. Sec. Assurance, Inc. v. Stephens, Inc.*, 450 F.3d 1257, 1269 (11th Cir. 2006). Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

After reviewing the record, reading the parties' briefs, and having the benefit of oral argument, we conclude that there is no merit to any of the arguments that Andrist makes in this appeal. In fact, his claims are foreclosed by the Supreme Court's decision in *Garcetti v. Ceballos*, 547 U.S. ___, 126 S. Ct. 1951 (2006), and our recent precedents of *Battle v. Bd. of Regents for Ga.*, 468 F.3d 755 (11th Cir. 2006), and *Vila v. Padron*, 484 F.3d 1334, No. 05-13776 (11th Cir. Apr. 20, 2007).

Accordingly, we affirm the district court's grant of summary judgment in favor of the defendants.

**AFFIRMED.**

**IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA AUGUSTA DIVISION**

LARRY ANDRIST,

Plaintiff,

v.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, which created and operated the Medical College of Georgia, MEDICAL COLLEGE OF GEORGIA, that created Defendant GCHC to provide healthcare to the inmates in the care of the Georgia Department of Corrections, for profit, GEORGIA CORRECTIONAL HEALTHCARE, a private association or corporation, and the employer of Defendant Coleman and Plaintiff, that contracted with the Georgia Department of Corrections to provide healthcare to inmates for profit, DANIEL W. RAHN, M.D., individually and in his official capacity under color of law as President of the Medical College of Georgia, DR. MICHAEL ASH, individually and in his official capacity under color of law as Senior Vice President for GCHC, ROBERT BRADFORD, individually and in his official capacity under color of law as Director for GCHC, ROBERT COLEMAN, individually and in his official

* CV 103-057

capacity under color of law as Manager for GCHC, JOHN DOE(S) whose true name(s) and number(s) are not currently known, under color of Georgia law, in conjunction with the named Defendants, all jointly and severally, and in conspiracy with one another,

Defendants.

**ORDER**

(Filed Jul. 20, 2006)

Plaintiff filed the captioned case alleging that Defendants retaliated against him in violation of the First Amendment and Georgia's Whistle Blower Act for his allegations of fraud and financial mismanagement. Presently before the Court is Defendants' Motion for Summary Judgment. (Doc. No. 35.) For reasons more fully stated below, Defendants' motion is **GRANTED.**

## I. Background

On July 1, 1997, Defendant Medical College of Georgia ("MCG") appointed Plaintiff Larry Andrist as the Fiscal Affairs Director for Defendant Georgia Correctional Healthcare ("GCHC").[1] (Defs.' St. of

[1] MCG is a division of Defendant Board of Regents of the University of Georgia. (Defs.' St. of Undisputed Mat. Facts ¶¶ 1-2.)

(Continued on following page)

Undisputed Mat. Facts ¶ 4.) As the Fiscal Affairs Director, Plaintiff was the chief financial officer of GCHC and was responsible for GCHC's financial reporting and accounting. (*Id.* ¶ 5.) As part of his duties, Plaintiff was required to report the abuse of public funds. (*Id.* ¶¶ 6-7.)

In the fall of 2000, an optometrist working for the Georgia prison system told Plaintiff that Defendant Robert Coleman, Director of Management Services at GCHC and Plaintiff's supervisor, was accepting kickbacks and engaging in unfair bid practices. (Decl. of Mayes Kendrick ¶¶ 72, 77-78, 135). Based on this accusation, Plaintiff began an investigation into Defendant Coleman's alleged financial improprieties. After reviewing the Purchasing Department's accounting records, Plaintiff contacted William P. Kissel, the Director of Health Services for the Georgia Department of Corrections ("GDC"), on December 19, 2000 and accused Defendant Coleman of financial misconduct. (Defs.' St. of Undisputed Mat. Facts ¶ 23.) Plaintiff also e-mailed the Georgia Bureau of Investigation ("GBI") on January 1, 2001 with his suspicions about Defendant Coleman's activities and requested that the GBI perform its own audit. (*Id.* ¶ 26.)

On January 8, 2001, Plaintiff made formal charges to MCG's Human Resources Division about

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GCHC is a department of MCG that was created to provide health care to inmates in over 80 Georgia Department of Corrections facilities. *Id.*

Defendant Coleman and also accused Defendant Robert Bradford, Director of GCHC, of divulging private information about Plaintiff's bipolar disorder to his coworkers.[2] (*Id.* ¶ 32; Depo. of Larry Andrist at 123.) Plaintiff also reported his findings about Defendant Coleman's alleged misconduct to MCG's Legal Office on January 19, 2001. (Defs.' St. of Undisputed Mat. Facts ¶ 33.)

Shortly after making these reports to the GBI and MCG's Legal Office and Human Resources Division, Plaintiff alleges that a pattern of retaliation began. On January 30, 2001, Plaintiff was escorted from a co-worker's office by two MCG campus police officers who threatened to handcuff him. (Decl. of Janice Rhymer ¶ 22-37). When Plaintiff went to Director of Human Resources Solomon Walker to complain about that incident, Mr. Walker directed Plaintiff to take a leave of absence and obtain a letter of fitness from his doctor before returning to work. (Andrist Decl. ¶¶ 193-94, 477-78). The next day Plaintiff obtained a fitness for duty letter from his physician. (*Id.* ¶ 196.) Plaintiff delivered this letter to Mr. Walker that afternoon, but Mr. Walker still wanted Plaintiff to take the rest of the week off from work. (*Id.* ¶ 478.) After agreeing to take the break,

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[2] Plaintiff had been treated for bipolar disorder at MCG since May 1999. Bipolar disorder is characterized in part by mania which may cause a person to act impulsively and recklessly, have a very high opinion of oneself, require less sleep, and talk excessively. (Defs.' St. of Undisputed Mat. Facts ¶¶ 9, 11.)

Plaintiff received a fitness-to-work letter from the doctor who Mr. Walker suggested that Plaintiff visit. (*Id.* ¶ 203.)

Soon after Plaintiff returned to work, Defendant Coleman relocated Plaintiff on April 18, 2001 from his office on the third floor of MCG's annex to a cubicle in the basement near Defendant Coleman's office. (*Id.* ¶ 206.) Plaintiff's new cubicle had no chairs, file cabinets, or tables. In addition to his geographical demotion, Plaintiff was relieved of the responsibility of attending financial meetings, which he had previously attended. (*Id.* ¶ 215.) Furthermore, the GCHC organizational structure was revised in May 2001 so that the three people who had previously reported to Plaintiff were transferred. As a result of this restructuring, Plaintiff no longer had any subordinates to assist him in his job. (*Id.* ¶¶ 216-18.)

Not long after Plaintiff was moved to the basement, he complained about the transfer to Andrew Newton, Associate Legal Advisor of MCG. (*Id.* ¶¶ 208-10.) After conducting an investigation, Newton expressed his concerns about Plaintiff's transfer to Defendant Michael Ash, Senior Vice President for Administration and Finance at GCHC, in an e-mail which states that "[t]his does look like a reduction in status and importance, and it does follow right on the heels of Mr. Andrist bringing forth his complaints. We should not move Mr. Andrist without a good reason, and even with a good reason we should consider whether it is worth the hassle of another complaint

and inquiry, and the risk that outsiders might second-guess us."[3] (Pl.'s Ex. 36.)

The next round of allegedly retaliatory actions about which Plaintiff complains occurred after the April 2002 Executive Medical Management Committee ("EMMC") meeting. According to Plaintiff, Defendant Coleman ordered Plaintiff to change the budget report so that it would show a surplus of over one hundred thousand dollars instead of a deficit of 3.7 million dollars.[4] Defendant Coleman also allegedly exacted a promise from Plaintiff that he would lie about the budget discrepancy at the upcoming EMMC meeting.[5] (Andrist Decl. ¶¶ 256-62). When Defendant Coleman presented the altered budget projection at the April 2002 EMMC meeting, Plaintiff tried to

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[3] Newton also explained in the e-mail that Defendant Coleman had misrepresented the circumstances of Plaintiff's transfer to Newton. (*Id.*)

[4] According to Plaintiff, this was not the first time that Defendant Coleman allegedly falsified the budget report. While preparing the budget for the March 2002 EMMC meeting, Plaintiff discovered that his organization's deficit had grown beyond the million dollar deficit that he had predicted in January 2002. (Andrist Decl. ¶¶ 234, 239-41.) In an attempt to cover up this bad news, Defendant Coleman allegedly directed Plaintiff to falsely inform the EMMC members that the new budget information was unavailable due to computer software problems. (*Id.* ¶¶ 241, 244-47).

[5] Defendants contend that Plaintiff was ordered not to talk to GDC officials because Defendant Rahn had directed that all financial information regarding GCHC pass through his office before being provided to GDC. (Defs.' St. of Undisputed Mat. Facts ¶¶ 54-56.)

dispute it but Defendant Coleman prevented him from speaking. (*Id.* ¶¶ 267-69). Undeterred, Plaintiff told a GDC official that the budget figures were wrong. (*Id.* ¶ 270.)

Soon after the April 2002 EMMC meeting, Plaintiff was transferred from his position as the Fiscal Affairs Director for Defendant GCHC to become a financial affairs manager at Augusta State Medical Prison ("ASMP"). (Defs.' St. of Undisputed Mat. Facts ¶ 65.) As part of his duties in this new position, Plaintiff was responsible for the management of ASMP's finances. (*Id.* ¶ 75.) After arriving at ASMP, Plaintiff began voicing concerns over general management issues and business practices. (*Id.* ¶¶ 81, 96.) When making these complaints, Plaintiff did not follow the chain of command and was reprimanded by Defendant Bradford for his repeated complaints involving past accusations that had already been investigated and found to be unsupported.[6] (*Id.* ¶ 97.) As a result of these complaints, Plaintiff alleges that his salary merit increase for 2002 was initially set lower than the average raise given to all other employees, but also acknowledges that his salary was raised by the average amount after Plaintiff met with Defendants Rahn and Bradford in October 2002. (*Id.* ¶ 92.)

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[6] Defendants emphasize that investigations by MCG, PriceWaterhouseCoopers, and the GBI revealed no evidence that supported Plaintiff's allegations of fraud and mismanagement. (Defs.' St. of Undisputed Mat. Facts ¶ 47.)

Dissatisfied with his treatment and Defendants' handling of his reports of financial improprieties, Plaintiff filed this lawsuit under 42 U.S.C. § 1983 seeking monetary damages for Defendants' alleged retaliation. Defendants now move for summary judgment contending that Plaintiff's claims of retaliation for his reports of financial mismanagement do not satisfy the test for imposing liability under the First Amendment as enunciated in *Pickering v. Board of Education*, 391 U.S. 563 (1968).

## II. Requirements for Summary Judgment

The Court should grant summary judgment only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Facts are "material" if they could affect the outcome of the suit under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The Court must view the facts in the light most favorable to the non-moving party, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), and must draw "all justifiable inferences in [its] favor," *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1437 (11th Cir. 1991) (en banc) (internal punctuation and citations omitted).

The moving party has the initial burden of showing the Court, by reference to materials on file, the basis for the motion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). How to carry this burden depends on

who bears the burden of proof at trial. *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993). If the *movant* bears the burden of proof at trial, that party "must show that, on all the essential elements of its case, . . . no reasonable jury could find for the non-moving party." *Four Parcels*, 941 F.2d at 1438. On the other hand, if the *non-movant* has the burden of proof at trial, the movant may carry the initial burden in one of two ways – by negating an essential element of the nonmovant's case or by showing that there is no evidence to prove a fact necessary to the nonmovant's case. *See Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 606-08 (11th Cir. 1991) (explaining *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970) and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)). Before the Court can evaluate the non-movant's response in opposition, it must first consider whether the movant has met its initial burden of showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Jones v. City of Columbus*, 120 F.3d 248, 254 (11th Cir. 1997) (per curiam). A mere conclusory statement that the non-movant cannot meet the burden at trial is insufficient. *Clark*, 929 F.2d at 608.

If – and only if – the movant carries its initial burden, the non-movant may avoid summary judgment only by "demonstrat[ing] that there is indeed a material issue of fact that precludes summary judgment." *Id.* Again, how to carry this burden depends on who bears the burden of proof at trial. If the *movant* has the burden of proof at trial, the non-movant may

avoid summary judgment only by coming forward with evidence from which a reasonable jury could find in its favor. *Anderson*, 477 U.S. at 249. If the *non-movant* bears the burden of proof at trial, the non-movant must tailor its response to the method by which the movant carries its initial burden. If the movant presents evidence affirmatively negating a material fact, the non-movant "must respond with evidence sufficient to withstand a directed verdict motion at trial on the material fact sought to be negated." *Fitzpatrick*, 2 F.3d at 1116. If the movant shows an absence of evidence on a material fact, the non-movant must either show that the record contains evidence that was "overlooked or ignored" by the movant or "come forward with additional evidence sufficient to withstand a directed verdict motion at trial based on the alleged evidentiary deficiency." *Id.* at 1116-17. The non-movant cannot carry its burden by relying on the pleadings or by repeating conclusory allegations contained in the complaint. *See Morris v. Ross*, 663 F.2d 1032, 1033-34 (11th Cir. 1981). Rather, the non-movant must respond by affidavits or as otherwise provided by Fed. R. Civ. P. 56.

The Clerk has given the non-moving party notice of the summary judgment motion and the summary judgment rules, of the right to file affidavits or other materials in opposition, and of the consequences of default. (Doc. No. 50.) Therefore, the notice requirements of *Griffith v. Wainwright*, 772 F.2d 822, 825 (11th Cir. 1985) (per curiam), are satisfied. The time

for filing materials in opposition has expired, and the motion is ripe for consideration.

## III. Analysis

Soon after Defendants filed this motion for summary judgment, the United States Supreme Court granted certiorari in a case to determine whether a public employee's speech expressed pursuant to the duties of his employment should be protected by the First Amendment. *Garcetti v. Ceballos*, 543 U.S. 1186 (2005). The Supreme Court has now answered this question in the negative by holding that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti v. Ceballos*, 126 S.Ct. 1951, 1960 (2006).

In light of the recent *Garcetti* decision, Plaintiff's First Amendment retaliation claims must fail because it is undisputed that Plaintiff's reports of fraud and financial mismanagement were made pursuant to his official duties as Fiscal Affairs Director at GCHC and as a financial manager at ASMP. Accordingly, Defendants' motion for summary judgment on Plaintiff's First Amendment retaliation claims is **GRANTED**.

The remaining claim in this case is Plaintiff's state law claim for violation of the Georgia Whistle Blower Statute, O.C.G.A.. § 45-1-4. Because jurisdiction over this claim rested solely upon 28 U.S.C.

§ 1367, the absence of a federal claim places supplemental jurisdiction in doubt. 28 U.S.C. § 1367(c)(3). Accordingly, Plaintiff's state law claim is **DISMISSED WITHOUT PREJUDICE**. *Id.*; *Crosby v. Paulk*, 187 F.3d 1339, 1352 (11th Cir. 1999).

The Clerk is instructed to **CLOSE** this case and **ENTER JUDGMENT** in favor of Defendants. Costs are taxed against Plaintiff.

**ORDER ENTERED** at Augusta, Georgia, this 20th day of July, 2006.

/s/ Dudley H. Bowen, Jr.
UNITED STATES
DISTRICT JUDGE

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

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No. 06-14689

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LARRY ANDRIST,

Plaintiff-Appellant,

versus

MEDICAL COLLEGE OF GEORGIA,
BOARD OF REGENTS OF THE
UNIVERSITY OF GEORGIA,
GEORGIA CORRECTIONAL HEALTH CARE,
ROBERT COLEMAN,
JOHN DOES, et al.,

Defendants-Appellees.

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On Appeal from the United States District Court
for the Southern District of Georgia

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(Filed Aug. 10, 2007)

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Before: DUBINA and BLACK, Circuit Judges, and RESTANI,* Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Susan H. Black
UNITED STATES CIRCUIT JUDGE

* Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.